IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 438 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHATRASINH MANSUKHBHAI

Versus

STATE OF GUJARAT

Appearance:

MR KR RAVAL for Appellant - appointed - absent

MR HM PRACHCHHAK APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 26/04/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by Chhatrasinh Mansukhbhai - original accused in Sessions Case No. 162 of 1996 of the Court of Sessions of Panchmahal at Godhra against judgment and order dated 11.4.1997 delivered by Additional Sessions Judge, Panchmahal at Godhra, convicting the present appellant for the charge proved against him under Section 302 of Indian Penal Code and under Section 201 of the Indian Penal Code and sentencing him for life imprisonment and fine of Rs.500/- in defult to undergo RI for six months and rigorous imprisonment three years and fine of Rs.200/- in default to undergo RI for three months respectively.

2. The facts leading to the prosecution case disclose that the incident occured at village Shivrajpur, Taluka Halol, District Panchmahal, in early morning of 1st of Arpil, 1996. Deceased Maniben, widow of Madabhai Valjibhai, had been to village Shivrajpur for attending the after death ceremony of his Diyer (younger brother of husband) and while she was passing through near Gram Panchayat Office, the accused appellant Chhatrasinh Manuskhbhai, who was warming himself through bonfire near Gram Panchayat Office, noticed deceased Maniben and confronted her in the belief that deceased Maniben was a witch. He was holding a stick in his hand and inflicted one blow of stick on temporal region of the face of Maniben. Due to infliction of stick blow, Maniben fallen down on the ground. At that time, accused - appellant threw one burning gunny bag on deceased Maniben and her sari had burnt. At that time, other brother of her husband and other persons on noticing the incident ran towards the scene of offence and accused appellant ran away from the spot. Due to stick blow, Maniben had died on the spot. Chhatrasinh Valjibhai Bariya, brother of the late husband of deceased, first went to Police Outpost of Shivrajpur, where occurrence report was recorded. A Police Constable of that Outpost accompanied Bhattrasinh Valjibhai to Halol Police Station and Complainant Chhatrasinh gave complaint before Halol Police Station at about 7.25 a.m. Police Head Constable PW-8 Exh. 19 Ratansinh Bhagvansinh recorded the complaint and registered the offence vide Crime Register No. I-101/1996 and the investigation was entrusted to PW-9 Harshadbhai Premshankar Dave who was PSI of Halol Police Station and thereafter the remaining investigation was compelted by PSI Mr. Rangitsinh Naransinh Gohil, PW-10 Exh.30.

3. A charge sheet for the offences punishable under Sections 302 and 201 of Indian Penal code was submitted before the Court of Judicial Magistrate, Frist Class, at

Halol by PW-10 Rangitsinh Naransinh Gohil and ultimately the case came to be committed to the Court of Sessions, Panchmahal at Godhra.

4. Learned Additional Sessions Judge vide Exh. 2 on 30.1.1997 framed the charges against the accused appellant for the offences punishable under Sections 302 and 201 of the Indian Penal Code to which appellant pleaded not guilty. Therefore, the prosecution examined as many as 10 witnesses and produced on record documentary evidence as well. The accused was given assistance of appointed Advocate for the Trail. After the evidence was over, statement of the accused appellant was recorded by the learned Trail Judge under Section 313 of the Criminal Procedure Code wherein his defence was of total denial. Thereafter, learned Trail Judge heard prosecution and defence and came to above conclsuion and hence this Appeal against conviction of the appellant.

5. Learned Advocate Mr. K.R.Raval was absent when the matter was called out, but along with learned APP Mr. H.M. Prachchhak for the respondent we have gone through each corner of the record and proceedings and evidence on record. Learned APP Mr.Prachchhak rendered thorough assistance to this Court in arriving at just conclusion.

6. On going through the evidence on record, it clearly appears that there are two eye witnesses of the incident and they are PW-5 Somabhai Punabhai Exh.14 and PW-7 Shankarbhai Chhogaji Exh.18. Both the eye witnesses have stated that the incident occurred at 6.00 a.m. PW-5 Somabhai Punabhai was going for taking tea on tea stall which was situated near Gram Panchayat Office while PW-7 Shankarbhai Chhogaji was running the pangalla and near the scene of offence he was in his pangalla at the time of the incident. Both the witnesses noticed that the accused was sitting and warming himself through bonfire. At that time, both the witnesses noticed that deceased Maniben came from her house and at some distance Chhatrasinh Valjibhai Bariya - complainant also was coming behind her. On noticing Maniben, the accused appellant got up with a stick and confronted with deceased Maniben and told her that Maniben was witch. Accused - apepllant thereafter inflicted one blow of stick on left side of the face of Maniben due to which Maniben had fallen down. Thereafter, according to PW-7 accused - appellant threw one burning gunny bag on the body of the deceased while PW-5 Somabhai Punabhai stated that when Maniben fallen down on the ground the accused appellant threw some burning coals on Maniben. Maniben had died on the spot and Chhatrasinh Valjibhai went to

Shivrajpur Outpost where his occurrence report was noted and ultiamtely complaint came to be registered at Halol Police Station.

7. Both the witnesses PW-5 and PW-7 have been extensively cross-examined. Distance from the cabin and distance from the ST stand to the scene of offence has been asked. They have also been asked whether they belonged to same community of which the deceased belonged, but nothing substantial could be brought about by the defence in the cross-examination to disbelieve these two eye witnesses. Their credibility or reliability could not be impeached by the defence nor their presence at the scene of offence could be discarded from the manner in which both the witnesses have deposed before the court. They appear to have been completely independent witnesses. None of the witnesses is an interested witness. Nothing is alleged that any of these two witnesses had a slightest cause to depose against the appellant - accused falsely in serious crime. Not only that but both the witnesses are fully corroborated by medical evidence i.e. deposition of PW-3 Exh.10 Dr. Manubhai Sheth and Postmortem Note Exh. 11. We do not find any reason to disbelieve these two eye witnesses. The Trail Court rightly beleived the incident having occurred as stated by these two witnesses.

8. Other important witness is PW-3 Dr. Manubhai Sheth Exh.10, who was at relevant time, Medical Officer of Shivrajpur Hospital. He received dead body through Police Yadi on 5.4.1996 at about 9.30 a.m. He started postmortem on dead body of Maniben at about 9.40 a.m. and compelted at 11.45. According to him, on external examiantion, the dead body had four injuries. Left ear had broken and there was deep wound of the size of 3 cms x 2 cms x 1 cm which was bleeding. The face was deformed. There was bleeding from the nose. There were fractures on left mandible and fracture on left side sinuses. There was fracture on left frontal bone. On the chin and on the chest there were burnt injuries and skin charring. Those injuries were, according to Doctor, antemortem and cause of death was head injuries and bleeding. Doctor was cross-examined by the defence extensively but nothing is coming out to disblieve the version which he deposed before the Court. PW-3 produced on record the Post-motem Note at Exh. 11.

9. PW-1 Bharatsinh Chandubhai is examined at Exh. 5 who was panch of inquest panchnama, which is produced at Exh. 6 and in all respects he has supported the inquest panchnama. PW-2 Girishkumar Chandrakant Shah is examined

at Exh.7 as panch of panchnama of scene of offence and in all respects he has also supported and proved panchnama of scene of offence, which is at Exh.8. He is also panch of panchnama at Exh. 9 by which the accused produced stick before the Police in the presence of panchas, which stick stated to have been used in crime. The said stick was seized by the Police through panchnama at Exh.9. PW-4 Himatsinh Veljibhai is also a panch of panchnama Exh.13 by which one sari and blouse recovered from the dead body, were seized by the Police. PW-4 has supported the said panchnama. Remaining four witnesses i.e. PW-6 Narvatsinh Chhaganbhai, PW-8 Ratansinh Bhagvansinh, PW-9 Harshad Premshankar Dave and PW-10 Rangitsinh Naransinh Gohil are the Police witnesses, examined by the prosecution. PW-6 Narvatsinh Chhaganbhai stated that on 5.4.1996 while he was serving as Outpost Jamadar at Shivrajpur, at about 6.00 a.m. complainant Chhatrasinh Valjibhai Bariya came to him and he requested to record a complaint which he recorded as Occurrence Reprot No.496 and thereafter said occurrence report was sent to Halol Police Station through Police Constable Mafatlal. Complainant - Chhatrasinh Valjibhai had since died appears not to have been examined by the prosecution. PW-6 Narvatsinh Chhaganbhai has been extensively cross-examined by the defence but the fact remains established that complainant Chhatrasinh Valjibhai went to Shivrajpur Outpost and occurrence report which is at Exh. 16 was recorded by this witness. PW-8 Ratansinh Bhagvansinh Exh.19 stated that on 5.4.1996 from 0.00 hours to 8.00 a.m. next day he was in-charge of Halol Police Station and at that time at about 7.25 a.m. Police Constable Mafatlal Chandubhai came with occurrence report No.496 which was registered at Halol Police Station by him. After registering the crime, the papers were forwarded to Police Sub-Inspector Mr. Dave. PW-8 identified the occurrence report which is at Exh. 20. He has been cross-examined in detail but there is nothing on the record to disbelieve that this witness received occurrence reprot through Police Constable and from that he registered the crime at about 7.25. PW-9 Exh.21 Harshad Premshankar Dave stated that the investigation of this offence was entrusted to him. He draw the panchnamas. Sent the dead body for postmortem. From the scene of offence he obtained blood-stained sample earth which was sent to Forensic Science Laboratory. He produced on record vide Exh.28 and Exh.29 the Analysis Report of Forensic Science Laboratory. No effective cross-examiantion appears to have undertaken by the defence of this witness except minor contradictions in the statement of the witnesses. The last witness PW-10 Exh.30 Rangitsinh Naransinh and on transfer of earlier

Investigating Officer, he resumed further investigation and submitted the charge sheet.

10. From the abvoe evidence, the learned Trail Judge convicted the accused for the above said charges.

11. Learned Trail Judge as was submitted before him, embarked upon the occurrence report and the complaint filed by Chhatrasinh Valjibhai at Exh. 20 as to whether the same can be exhibited and looked into especially in the circumstances when complainant Chattarsinh died after the complaint was recorded and could not be examined by the prosecution. We find that though the complaint is exhibited, it can be used for corroboation or contradiction only, and because of non-availability of the complainant, the evidentiary value of the said complaint is reduced to nothing, though through other police witnesses it is proved that complainant Chhatrasinh Valjibhai went to Shivrajpur Outpost and before PW-6 Narvatsinh Chhaganbhai he gave occurrence report which was sent to Halol Police Station through Police Constable Mafatlal, and such occurrence report was duly registered by PW-8 Ratansinh Bhagvansinh, the then PSO of Halol Police Station.

12. As discussed above, we have no reason at all to take a different view of the matter than taken by the learned Trai Judge about the occurrence of the incident wherein accused - appellant did inflict a blow of stick on left side of the face of the deceased due to which she died. There are two eye witnesses as discussed above to prove the prosecution case to that extent and there is no iota of doubt about the credibility and reliability of PW-5 and PW-7 who have narrated the incident in the rightful, simple and natural manner. These witnesses are fully corroborated by medical evidence and other police witnesses. Panchnamas of scene of offence, inquest panchnama as well as panchnama of arrest of the accused are also duly proved and, therefore, so far as occurrence of the incident is concerned, we conclude that we agree with the learned Trail Judge that the deceased Maniben died due to stick blows given by the accused appellant and accused - appellant only.

13. However, taking the totality of circumstances into consideration and the evidence of the prosecution as it stands which is acceptable, the question is whether the appellant - accused is guilty of highest degree of culpable homicide i.e. murder or any lesser offence and secondly whether though the prosecution case is proved as it stands agaisnt the appellant - accused, the offence

under Section 201 of the Indian Penal Code is made out beyond reasonable doubt against the accused - appellant.

14. First we shall discuss the conviction of the appellant by the learned Trail Judge under Section 201 of the IPC. Charge which is framed against accused appellant vide Exh.2 discloses that the accused appellant with the intention to disappear the evidence and to conseal the same, threw burning gunny bag on the dead body of deceased Maniben, thereby sari worn by the deceased got the flame and started burning. Against this PW-5 Somabhai Punabhai stated that as soon as Maniben fallen on the ground, accused - appellant threw some burning coals on Maniben, due to which her sari started burning while PW-7 Shankarbhai Chhogaji stated to the extent that in fact accused - appellant threw gunny bag which was burning on the dead body of the deceased due to which her sari started burning. From this evidence and submissions made on behalf of the prosecution before the learned Trail Judge, after discussion, the learned Trail Judge came to the conclusion that the intention of the accused appellant was to burn the dead body of the deceased so as to conceal or to disappear the evidence of the crime and, therefore, he was found guilty under Section 201 of the Indian Pencal Code by the learned Trail Judge. However, taking the overall view of the matter and taking into consideration the evidence as well, we are unable to agree with the learned Trail Judge. Firstly Section 201 is attracted only when the accused with the knowledge of the offence which he committed, caused any evidence of commission of that offence to disappear or gave any information relating to that offence which he knew or believed to be false. We are concerned with the first part of the ingredient which discloses that the commission of an offence was within the knowledge of the accused and with such knowledge and belief the accused caused to disappear the evidence. From the discussion in the judgment it appears that the learned Trail Judge has formed the opinion on the part of the appellant accused to the extent that the act of throwing burning gunny bag on the part of the accused on the dead body of the deceased was the act to deform the body causing difficulties in identification of the body. Now, the true import of word "causes" in the collection of the words "causes any evidence of the commission of the offence to disappear" clearly envisages some active steps on the part of the doer of the act, therefore, in the matter of causing disappearance of evidence relevant to a particular offence, the person charged must be proved to have actively participated in the matter of disappearance of evidence denoting that such doing of the

accused must be deliberate design. While what we found from the evidence of PW-5 and PW-7 is only act of the accused throwing burning gunny bag on the dead body of the deceased. It is very difficult to derive deliberate design on the part of the accused in throwing burning gunny bag on the dead body of deceased so as to link him with a phrase "cause to disappear the evidence". Perhaps the evidence of medical expert escaped from the mind and consideration of learned Trail Judge because PW-2 in his deposition as well as in Postmortem Note at Exh.11 categorically stated that the dead body had burn injury on her chest and on her chin. It is vitally important that PW-3 Dr. Manubhai Sheth also deposed that these injuries were antemortem. This fact has not even challenged by the defence in the cross-examination. Therefore, it comes to that when burning gunny bag was thrown on the dead body of the deceased, the deceased was living and due to burn of her sari, she received burn injuries of charring skin on chin and her chest. In these circumstances, the question of deliberate design of the accused to burn the dead body or deform the same to the extent of unidentifying state would not arise at all. The fact is proved that the accused - appellant did throw burning gunny bag or burning coal on deceased Maniben, but the same was thrown to hurt Maniben because she was very much alive at that time. Therefore, we can easily deduce from the sequence of events that the intention of the accused - appellant in committing the act and throwing gunny bag on the deceased was not clearly to cause the evidence to disappear but was to harm the deceased which he believed to be a witch. By no stretch of reasoning, it can be said that by act of throwing gunny bag on the dead body of the deceased, the accused - appellant was liable to be punished under Section 201 of the Indian Penal Code. The charge framed against the accused appellant refers a dead body when gunny bag was thrown on her, while medical expert undoubtedly established that the injury which the deceased received due to burning was antemortem injuries. This can be turned as an added act of the accused - appellant in harming the deceased but in no case it could be said to be an act to cause the evidence to disappear. It is also pertinent to note that PW-3 Dr. Manubhai Sheth further stated in his deposition that the death was due to stick blow on the head and bleeding and, therefore, the cause of death was not burnt injuries. Those were simple burn injuries. In view of this discussion, we are unable to uphold the conviction of the accused - appellant by learned Trail Judge for the offence under Section 201 of the Indian Penal Code and also sentence awarded for the same. The appeal of the accused - appellant in this

respect is required to be allowed and the conviction and sentence in respect of Section 201 is required to be set aside and the accused appellant is required to be acquitted of the said charge.

15. Now, the question of lesser offence is concerned, on detailed scrutiny we have found that in no case the accused - appellant can be found guilty for the ultimate decree of the culpable homicide. This is so because on appreciating the evidence we have found that the act of the appellant - accused though has been fully proved, does not fall within any of the four clauses of Section 300. In all four clauses of Section 300, intention of the doer is a prime mental state of the accused which is required to be proved by the prosecution along with as per the fourth clause, knowledge to the extent that the act was imminently dangerous that in all probability it will cause death. Therefore, the endeavour of the Trail Court ought to have been pivoted towards finding out the intention of the accused - appellant and a degree of mens rea as engrafted in Section 300. No such attempt has been made by the learned Trail Judge. It is always difficlut task for the courts to find out what was the intention of the accused - appellant in doing a particular act. It is always necessary that in deciding the question of intention of causing death, the nature of the weapon used, the part of the body on which blow was given, the force and number of blows, attending circumstances are the factors generally from which inference as to the intention can be drawn. A men's intention must, in the generality of cases, be gathered only from his act. This is more important because when death is caused with intention, it is punishable under Section 302 of the Indian Pencal Code unless it falls within the Exceptions of Section 300. In that case, the act may be punishable in First Part of Section 304 but on scrutiny if it is found that the act of the accused appellant is not with intention to cause death and the act of the accused is with mere knowledge as referred under Section 299 Clause (3), then the same is punishable in the Second Part of Section 304 of the Indian Penal Code.

16. Knowledge and intention to cause death can only be differentiated through velocity of the blow given and location of injury and the nature of the same. In addition to what is stated above about finding out of the intention of the accused, it is also essential feature that an intention carries pre-meditation. Pre-meditation is a state of mind of the accused while knowledge as contrasted with intention would more probably signified

as a state of mental realization in which the mind is a recipient of certain ideas and impressions arises in it or passing before it. This distinction is subtle but discernible. What is required to be found out is a degree of mens rea which can be measured from the facts of the case and other attending circumstances.

17. Reverting to the facts of this case, it is clear that there was no pre-meditation on the part of the accused - appellant. The case as has been established by the prosecution, the accused - appellant was sitting near Gram Panchayat Office and was warming himself in the bonfire and accidentally for her own purpose the deceased victim lady happened to pass through near the Gram Panchayat Office. Unfortuantely, the accused appellant reared belief that deceased was a witch and was harming him. In this background of the facts, we noticed that on the day of the incident deceased Maniben while accidently passing through near accused - appellant, he inflicted the blow. The degree of mens rea is undoubtedly not covered by required pre-meditation which is essential to form the required intetnion. Further, the injury caused by the appellant accused though was sufficient in ordinary course of nature to cause death but the injury caused by the accused appellant was by a simple and ordinary stick and not exactly on head but on temporal region of the face. It is unfortuante that the injury by stick resulted in death of the victim. Had the intention of the accused appellant was to cause murder of the deceased then, he would not have restricted himself by one blow but he would have inflicted several blows before other persons reached to the spot. The act of throwing burning gunny bag on the deceased also would not denote intention on the part of the accused - appellant to cause murder in view of the medical evidence. The incident having occurred in the above circumstances, no pre-meditation on the part of the accused, blow by ordinary stick, only one blow on temporal region of the face and other attending circumstances clearly denotes that there was total absence of required intention on the part of the accused - appellant to cause murder of the victim or cause such bodily injury with intention which was sufficient in ordinary course of nature to cause death. At the most, we can attribute the knowedge on the part of the accused as envisaged by Section 299 of the Indian Pencal Code. From the evidence on record, it can be said that the accused - appellant knew that by inflicting stick blow on the temporal region of the deceased, the result was likely to cause death of the decdeased. In the conclusion, we do not accept the conviction awarded to the accused appellant by learned

Trail Judge for the charge under Section 302 of the Indian Penal Code but for the reasons above stated we have found that the accused appellant is guilty of lesser offence and liable to be punished under Section 304 Part-II of the Indian Pencal Code. The appeal of the accused - appelant is required to be allowed partly in this respect.

18. While the accused is found guilty for the lesser offence under Section 304 Part-II of the Indian Penal Code, now the question is after setting aside the imprisonment of life as awarded by the Trail Judge, what punishment should be awarded to the accused - appellant for the charge under Section 304 Part-II. Learned APP Mr. Prachchhak has palced on record jail sheet of the appellant - accused. Upto 14th February 2004, as disclosed by the jail sheet, the accused - appellant has remained as undertrail prisoner for about one year and six days. After conviction on 11.4.1997 utpo 14.2.2004 he has undergone the imprisonment of 6 years 8 months and 21 days. The jail sheet further reveals that the accused appellant also earned remission of two years. Taking into consideration this period of two years, the accused appellant has undergone the sentence for more than 9 years. In this view of the matter, we find it just and proer to award sentence of imprisonment to the accused appellant for the period for which he has already undergone for the charges proved against him under section 304 Part-II. In the result, the appeal of the appellant - accused is required to be allowed partly as above said and hence the following order is passed.

" This Appeal is partly allowed to the extent that conviction awarded by the learned Additional Sessions Judge, Panchmahals at Godhrato appellant accused under Section 201 of the Indian Penal Code and sentencing him for the rigorous imprisonment of three years and fine of Rs. 200/- in default to undergo one month imprisonment is set aside and the appellant accused is acquitted of the charge under Section 201 of the Indian Penal Code and conviction awarded by the learned Additional Sessions Judge to the appellant accused for the charge proved under Section 302 of the Indian Penal Code and sentencing him for the imprisonment of life and fine of Rs.500/- in default to undergo six months RI is set aside and instead the appellant accused is held guilty for the lessor offence under Section 304 Part-II of Indian Penal Code and is sentenced to the imprisonment he has already undergone. The appellant - accused is ordered to be set at liberty forthwith if he is not required to be detained for any other purpose. Fine, if

paid, be refunded to the appellant accused forthwith.

(B.J. Shethna,J.)

(J.R. Vora, J.)

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